APPENDIX TO RESPONDENTS' BRIEF.

Answer of Defendant, Bauer-Smith Dredging Company, copied from Transcript of Record, pages 20-23:

Now Comes Bauer-Smith Dredging Company, the defendant herein, and for answer to plaintiffs' original petition would respectfully show:

1.

By way of special exceptions, defendant would respectfully show as follows:

(1) Plaintiffs' petition does not state a cause of action at law, and defendant prays that the petition accordingly be dismissed with costs, save and except defendant's counterclaim.

(2) That the United States of America is a necessary and indispensible party and is the real party in interest to this cause of action and the original petition filed by plaintiffs is fatally defective by reason of the nonjoinder of a necessary and indispensible party and the real party in interest and plaintiffs' cause of action should accordingly be dismissed.

(3) That by reason of a perpetual right and easement to discharge dredged material upon plaintiffs' land which is held by the United States of America, the defendant, as a contracting agent for the United States, had, at all times mentioned in plaintiffs' petition, a paramount legal right to deposit dredged material upon the land described in plaintiffs' petition, irrespective of how said land was used and plaintiffs in fact and in law, were trespassing or encroaching upon a perpetual easement held by the United States

and under which defendant performed dredging services described in plaintiffs' petition.

(4) That the defendant, as a government contractor cannot as a matter of law be sued by the plaintiffs.

Of which special exceptions, each being taken separately and apart from each other, defendant prays judgment of the Court, together with costs.

2.

Without waiving the foregoing special exceptions, but still insisting upon same, for further answer herein, if any be necessary, defendant denies each and every, all and singular the allegation in said petition contained and demands strict proof thereof.

3.

As a counterclaim arising out of the transaction or occurrence described in the plaintiffs' petition, defendant avers that upon the instance and request of the lessee of McFaddin's land, described in plaintiffs' petition, the defendant expended the sum of $5,000.00, as near as can be determined at this time, to save plaintiffs' 1952 rice crop and mitigate damages which plaintiffs claimed would result from the dumping of spoil upon the land designated as spoil areas by the United States. That at the time defendant expended said sum of money it was agreed and understood between the parties hereto that the cash expended by defendant would be refunded from the proceeds received from the crop of rice saved, that plaintiffs received the admitted sum of $132,278.46 for the 1952 rice crop which was harvested from the land alleged to be damaged but plaintiffs failed to reimburse the defendant for cash expended for their benefit and in their behalf, although due

demand has been made for repayment of same. That at the time the defendant advanced cash to lessen claimed damage to a rice crop it was unknown to the parties hereto that the United States had a paramount right and perpetual easement to dump dredged material upon the land described in plaintiffs' petition and that by reason of mutual mistake the defendant is entitled to recover all sums of money expended in behalf of and for the benefit of the plaintiffs.

Wherefore, Premises Considered, defendant prays that upon trial hereof it have judgment in its behalf, together with costs, that it go hence without day, and that it have such other and further relief, both special and general, at law and in equity to which it may prove itself justly entitled.

T. G. Schirmeyer,
761 San Jacinto Building,
Houston, Texas,
Attorney for Defendant.

cc:

Marcus & Weller
P. O. Box 350
Beaumont, Texas
Attys. for Plaintiffs

Filed M Sept. 15, 1953, James R. Cooney, Clerk, U. S. Court. By Mary G. Wakefield, Deputy.

Endorsement: C. A. No. 2471. No. 66631. In the United States District Court for the Eastern District Beaumont Division. Roy Tully et al. Plaintiffs v. Bauer-Smith Dredging Company, Defendant. Answer. Filed at 11

o'clock A. M. Nov. 31, 1953. L. R. "Speedy" Blakeman, Clerk, District Clerk of Jefferson Co., Texas, R. E. Carter, Deputy.

Plaintiffs' Reply to Defendant's Cross-Action, copied from Transcript of Record, pages 33-35:

TO THE HONORABLE COURT:

Plaintiffs file this, their answer to the cross-action of defendant, and for answer thereto would show:

1.

Answering Paragraph 3 of the defendant's counter claim the plaintiffs, L. W. Tully and Roy Tully, admit that defendant expended some money to mitigate damages which said plaintiffs told defendant's officer, agents and employees would probably ensue, and say that defendant admitted their responsibility for permitting spoil and salt water in the "lead ditch", and for putting salt water in the fresh water reservoir, but said plaintiffs deny that defendant expended $5,000.00, and deny that they agreed to refund the defendant any sum from the proceeds of said crop.

The plaintiffs, Roy Tully and L. W. Tully, deny that any demand was ever made upon them for any such refund, but say that defendant at all times admitted its liability and responsibility for such damages as accrued, and in fact had agreed to settlement of such claim, but the plaintiffs would not execute the type of release and agreement demanded of plaintiffs.

The plaintiffs and cross-defendants other than L. W. Tully and Roy Tully deny all the allegations of the cross-action, and deny that L. W. Tully or Roy Tully were their agents or were authorized to make any agreement for and on their behalf save and except that said plaintiffs were

informed of the settlement agreement proposed and has assented thereto. They deny that any demand for reimbursement has been made as alleged by cross-plaintiff.

2.

Further answering the last part of Paragraph No. 3; cross-defendants deny that the United States had a paramount right and perpetual easement to dump dredged material in the "lead ditch" and fresh water reservoir of plaintiffs.

3.

Answering the prayer of the cross-action, plaintiffs deny that defendant is entitled to any relief prayed for.

Respectfully submitted,

Geo. A. Weller,
Marcus & Weller,
P. O. Box 350,
Beaumont, Texas.

A copy of the foregoing answer was mailed to Mr. T. G. Schirmeyer, 761 San Jacinto Building, Houston 2, Texas, attorney for defendant and cross-plaintiff, on the 8th day of October, 1953.

Geo. A. Weller,
Of Counsel.

Endorsement. Civil Action No. 2471. No. 66631. Roy Tully et al., Plaintiff, v. Bauer-Smith Dredging Company, Defendant. Plaintiff's Reply to Defendant's Cross-Action (Duplicate). Filed at 11 o'clock A. M. November 30, 1953. L. R. "Speedy" Blakeman, Clerk; District Court of Jefferson Co., Texas. By R. E. Carter, Deputy.

MOTION FOR REHEARING.

Appellant's Motion for Rehearing filed in the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, on October 4, 1957 (only the assignments of error have been copied and the argument omitted):

To The Honorable Court of Civil Appeals:

Now comes Bauer-Smith Dredging Company, Appellant in the above entitled and numbered cause, and respectfully files this, its motion for rehearing herein, and respectfully prays the court, upon consideration hereof, to set aside the judgment affirming this cause rendered on September 19, 1957, and upon rehearing to reverse the erroneous judgment of the trial court; or, in the alternative, that the court reverse the judgment in part and here render such judgment as may be requisite and proper under the pleadings and the evidence, and in support of this motion appellant says:

1.

The court erred in overruling and in refusing to sustain Point One of the appellant, reading as follows: "The trial court erred in failing to recognize the defendant's defense that the plaintiffs had previously given the United States Government the right of way and easement to do the very things made the basis of this suit—to dump spoil on the land of the plaintiffs in the area involved in this suit."

2.

The court erred in overruling and in refusing to sustain Point Two of the appellant, reading as follows: "The

trial court erred when it refused to rule that there can be no recovery from this defendant contractor because the acts complained of were legally authorized by the government to improve navigation and such acts should be regarded as the acts of the government and not the personal acts of the contractor."

3.

The court erred in overruling and in refusing to sustain Point Three of the appellant, reading as follows: "The trial court erred when it failed to recognize that there can be no recovery as a matter of law against a government contractor on the ground that he has abused a discretion given him by the government."

4.

The court erred in overruling and in refusing to sustain Point Four of the appellant, reading as follows: "There can be no recovery for damages to the realty because the plaintiffs who own the land are not seeking damages with respect to the realty, and the plaintiffs who are tenants upon the land and who are seeking such damages have no proper interest herein upon which to predicate such a claim."

5.

The court erred in overruling and in refusing to sustain Point Five of the appellant, reading as follows: "The damages alleged do not constitute a taking of property but were merely consequential for which there can be no recovery."

6.

The court erred in overruling and in refusing to sustain Point Six of the appellant, reading as follows: "The trial

court erred in submitting Special Issues 24, 25 and 26 because the defendant had a right, under the land and under the easement, to deposit spoil where it did and the acts of Duplechan in so doing could create no liability for exemplary or punitive damages."

7.

The opinion of the court is in direct and irreconcilable conflict with the opinion of the Supreme Court of Texas in *Glade* v. *Dietert*, 295 S.W. 2d 642, wherein the Supreme Court held that a contractor was not liable to third parties in doing work for a public body, while in the case at bar this court held exactly the opposite, although *Glade* v. *Dietert* is not cited.

8.

The court erroneously construed the substantive law of Texas by holding in substance that although the right of way easement could constitute a defense in a suit by the appellees against appellant's principal, the United States of America, such a defense is not available to the contractor herein, under the rationale of *Lynn* v. *United States*, (C.A. 5) 110 F. 2d 590.

9.

The court erroneously construed the substantive law of Texas by holding in substance that although the right of way easement could constitute a defense in a suit by the appellees against appellant's principal, the United States of America, such a defense is not available to the contractor herein, under the rationale of *Atchley* v. *Tennessee Valley Authority*, 69 F. Supp. 952.

10.

The court erroneously construed the substantive law of Texas, and of the United States, because here the evidence conclusively showed that the appellant contractor was acting for the government of the United States in prosecuting the work and under the unbroken line of decisions by the Supreme Court of the United States, appellant, as the contractor, is not liable to third parties for injuries sustained while appellant was so engaged; this court, in the case at bar, has held the exact converse, thereby subjecting appellant to liability where none exists under the law.

Excerpt from Petitioner's Application for Writ of Error filed in the Supreme Court of Texas. The points of error relied upon taken from pages 5 and 6 of this brief are:

LIST OF POINTS RELIED ON.

FIRST POINT.

Where a landowner conveys to the United States of America and its assigns, a perpetual *unrestricted easement* to deposit dredged material upon his land, then neither the landowner nor his tenants have a legal right to sue a contractor, dredging a public waterway under the supervision of the United States, for damages resulting from the deposit of dredged material upon land covered by the easement.

SECOND POINT.

The authority granted to the Petitioner by the United States was not exceeded and according to law Petitioner is immune from liability.

THIRD POINT.

Irrespective of the government easement and government immunity, the agents of the United States are not liable for the consequences or damages arising out of the maintenance of navigation improvements.

FOURTH POINT.

Assuming that salt water did reach Tully's so-called lead ditch when he notified the men on the dredge of his ditch on Friday, July 18, 1952, nevertheless, he cannot recover for damages resulting from salt water deposit because he failed to take prompt action to block the uphill flow of salt water in his ditch.

Certified copy furnished by Court of Civil Appeals and filed with this Court.